No. [redacted]74

JUL 10 1922
WM. R. STANSBURY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1921

No.

THE SALEM TRUST COMPANY,
Petitioner

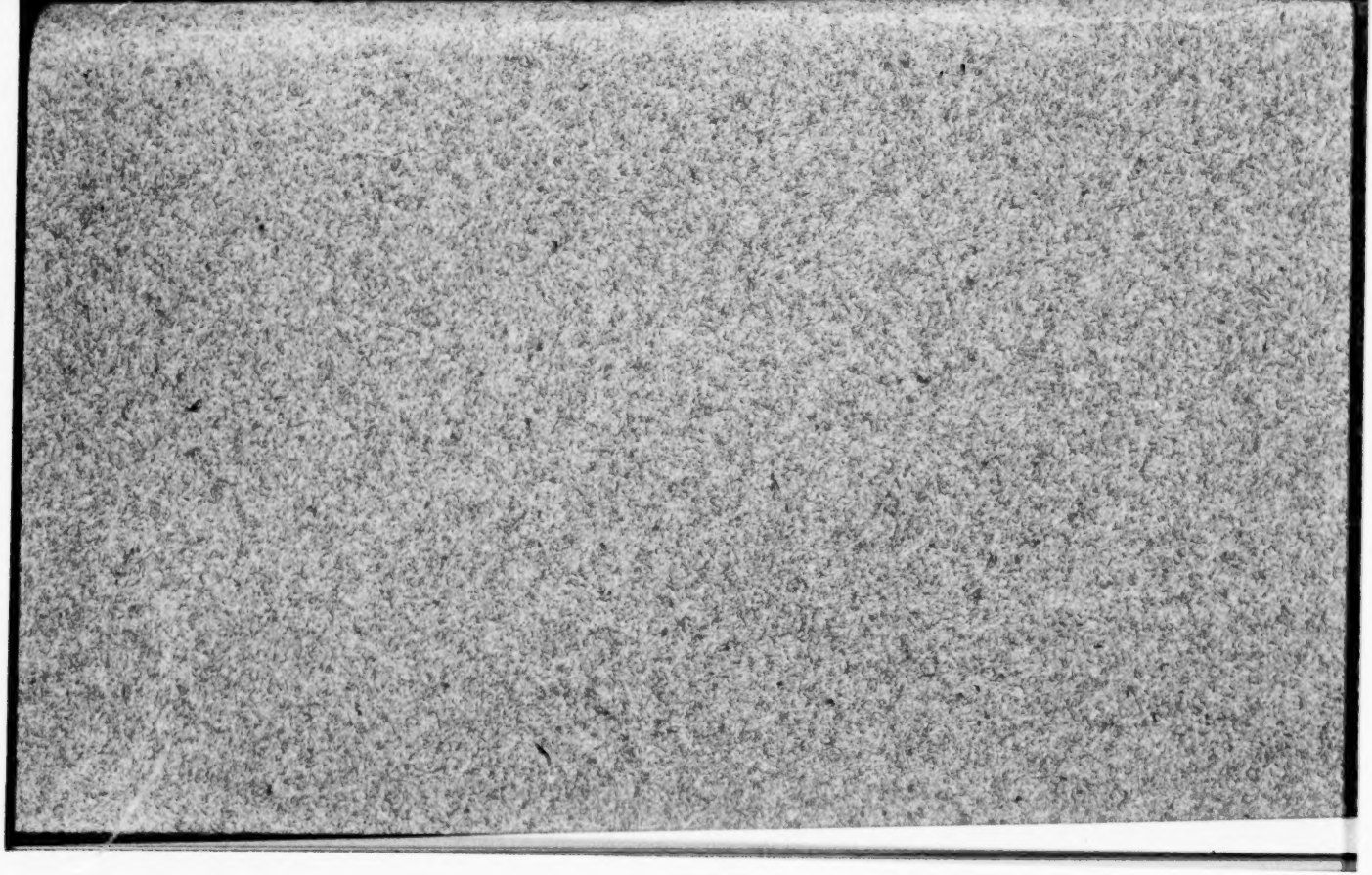
v.

MANUFACTURERS' FINANCE COMPANY ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF FOR PETITIONER

ALEXANDER WHITESIDE
HOWARD STOCKTON, Jr.
RAYMOND P. BALDWIN
Counsel

PRESS OF GEO. H. ELLIS CO., INC., BOSTON



SUBJECT INDEX

PAGES

PETITION FOR CERTIORARI 1

BRIEF

Statement of Facts 7

Statement of questions involved 9

The case was erroneously removed from the Massachusetts Courts 10

Substantive grounds for certiorari 11

Introduction 11

The decision of the Circuit Court of Appeals for the First Circuit is in conflict with the decision of Circuit Court of Appeals for the Sixth Circuit in *Petition of the National Discount Company*, 272 Fed. 570 (1921) . . 14

Said decision is contrary to the rule laid down by the Supreme Judicial Court of Massachusetts 16

Said decision is inconsistent with the principles laid down by the Supreme Court of the United States in *Greey* v. *Dockendorff*, 231 U. S. 513 19

Said decision is contrary to the true principles of law and equity pertaining to the question involved 20

The question involved is one of great importance 24

Conclusion 25

CASES CITED IN BRIEF

	PAGES
Bryant v. *Swofford*, 214 U. S. 279	18
Coleman & Co. v. *Tawas Co.* (*See In re Leterman, Becher & Co.*), 250 U. S. 668	17, 25
Dearle v. *Hall*, 3 *Russell* 1	17, 21, 23
Etheridge v. *Sperry*, 139 U. S. 266	18
Farmers & Merchants Bank v. *Farwell*, 58 Fed. 633, 637 to 639	20, 23
Greey v. *Dockendorff*, 231 U. S. 513	18, 19, 20, 23
Hamilton Brown Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 257, 258	17, 25
Hawley Down-Draft Furnace Co., 238 Fed. 122	20
Herman v. *Conn. Mutual Life Ins. Co.*, 218 Mass. 181, 186	16
Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 315	12
Humphrey v. *Tatman*, 198 U. S. 91	18
Judson v. *Corcoran*, 17 Howard 612	17, 20, 22, 23
Laclede Bank v. *Schuler*, 120 U. S. 511 at 516	20, 22, 23
In re Leterman, Becher & Co. 260 Fed. 543	17, 20, 23, 24, 25
Mass. & Southern Construction Co. v. *Cane Creek Township*, 155 U. S. 283	10
Methven v. *Staten Island Light, Heat and Power Co.*, 66 Fed. 113	17, 20, 23, 24, 25
Petition of National Discount Company, 272 Fed. 570	14, 20, 25
Putnam v. *Story*, 132 Mass. 205	16
Rabinowitz v. *People's National Bank*, 235 Mass. 102, 104	16
Shaffer v. *Carter*, 252 U. S. 37, 53	12
Spain v. *Hamilton's Administrator*, 1 Wall. 604	17, 20, 22, 23
Thayer v. *Daniels*, 113 Mass. 129	16
Thompson v. *Fairbanks*, 196 U. S. 516, 523	18
Wilson v. *Oswego Township*, 151 U. S. 56	10
York Mfg. Co. v. *Cassell*, 201 U. S. 344	18

Supreme Court of the United States

OCTOBER TERM, 1921

No.

THE SALEM TRUST COMPANY,

Petitioner

v.

MANUFACTURERS' FINANCE COMPANY ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI, TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, AND BRIEF FOR PETITIONER

To the Honorable Justices of the Supreme Court of the United States:

Respectfully represents your Petitioner, The Salem Trust Company:

I. That it is a trust company duly organized under the laws of the Commonwealth of Massachusetts, and having its principal place of business in Salem in said Commonwealth and that, as such, part of its authorized business is to lend money and to receive therefor assignments of accounts receivable.

II. On May 16, 1919, your Petitioner made a loan to the Nelson Blower & Furnace Company, a Massachusetts corpora-

tion, of money, for which your Petitioner received as security an assignment to it by the Nelson Blower & Furnace Company (hereinafter called the assignor) of accounts receivable owed to the assignor by the Murray & Tregurtha Corporation, also a Massachusetts corporation.

III. This assignment was made and took effect in Massachusetts, the assignor and assignee both being citizens of Massachusetts, the person owing the money which was assigned, being a citizen of Massachusetts, and the money being payable in Massachusetts.

IV. Subsequent to this assignment the assignor assigned the same accounts receivable to the Respondent, Manufacturers' Finance Company, (a corporation duly organized and existing under the laws of the State of Delaware, but having a usual place of business in Boston in the District of Massachusetts, having complied with the provisions of the Massachusetts laws relative to doing business in Massachusetts by foreign corporations,) which took the assignment as security for a loan to the assignor, without inquiring of the Murray & Tregurtha Corporation as to whether notice had been given it of any previous assignment.

V. On or about September 20, 1919, about one week before the assignor was placed in the hands of a receiver, the Respondent, Manufacturers' Finance Company, notified the Murray & Tregurtha Corporation that the accounts receivable had been assigned to the Manufacturers' Finance Company.

VI. The rival assignees agreed with each other that the assignor should finish the work being done for the Murray & Tregurtha Corporation and that the net proceeds amounting to $7963.36 (less than the amount of the claim of either assignee) should be deposited in the Respondent, the International Trust Company, (a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts and having a usual place of business in Boston in the District of Massachusetts,) in a special deposit standing in the name of the Manufacturers' Finance Company as trustee, pending the determination by a court of competent jurisdiction, of the question as to which assignee was entitled to such proceeds.

VII. Your Petitioner, in accordance with the terms of the agreement between it and the Respondent, Manufacturers' Finance Company, brought a Bill in Equity in the Superior Court for the County of Suffolk and Commonwealth of Massachusetts, and the Respondent, Manufacturers' Finance Company, filed a Motion that the suit should be removed to the District Court of the United States for the District of Massachusetts, and, against the objection of your Petitioner, the suit was so removed and was heard by Anderson, J., and dismissed by a Final Decree entered May 6, 1921.

VIII. Thereafter, upon appeal by The Salem Trust Company, the United States Circuit Court of Appeals for the First Circuit, by a decision handed down on April 11, 1922, affirmed the decree of the District Court, with costs, to the Manufacturers' Finance Company, appellee in that Court. A dissenting opinion was rendered by Brown, J.

IX. That in none of the aforesaid proceedings has it been denied that the parties to the first assignment were both citizens of Massachusetts and that the debtor owing the account assigned, was a citizen of Massachusetts; nor that the first assignment was made in Massachusetts; nor that the second assignment was made in Massachusetts, by a citizen of Massachusetts to a citizen of Delaware, a corporation actually having a place of business in Massachusetts, on account of a compliance with the laws of Massachusetts, of an account owed to the assignor by a citizen of Massachusetts, and payable in Massachusetts. Nor has it been denied that by the law of the Commonwealth of Massachusetts, as set forth in the decisions of its Supreme Judicial Court, a prior assignment prevails against a subsequent assignment, unless the subsequent assignee at least made inquiry of the debtor and was actually deceived by the failure of the prior assignee to give notice. Nor was it in any way contended in the aforesaid proceedings that the Respondent, Manufacturers' Finance Company, made any inquiry of the debtor prior to accepting the assignment of the said accounts receivable.

Questions Involved and Grounds on which your Petitioner Bases this Application

1. Was the proceeding erroneously removed from the Massachusetts Court to the United States Court?

2. Which assignee has the prior claim to the proceeds of the assigned accounts?

The Circuit Court of Appeals for the First Circuit held the second assignee should prevail, on account of the fact that it had first given notice to the person owing the assigned accounts. Your Petitioner contends that said decision is erroneous and that it should be reviewed by this Court for the following reasons:—

(*a*) Because said decision is inconsistent with the principles laid down by the Circuit Court of Appeals for the Sixth Circuit in

Petition of National Discount Company, 272 Fed. 570.

(*b*) Because said decision is contrary to the rule in such cases laid down by the Supreme Judicial Court of Massachusetts,—

Putnam v. *Storey*, 132 Mass. 205;
Thayer v. *Daniels*, 113 Mass. 129;
Herman v. *Connecticut Mutual Life Insurance Co.*, 218 Mass. 181, 186;
Rabinowitz v. *People's National Bank*, 235 Mass. 102, 104;

and contrary to the statutory law of said Commonwealth as expressed in R. L. c. 173, sec. 4.

(*c*) Because said decision is inconsistent with the principles laid down by this Court in the case of

Grecy v. *Dockendorff*, 231 U. S. 513.

(*d*) Because said decision is contrary to the true principles of law and equity pertaining to the question involved.

(*e*) Because the question involved is one of great importance involving the rights of all persons taking assignments of *choses-in-action*.

X. Your Petitioner makes a part of this petition the reported decisions hereinbefore referred to and submits a certified copy of the record of said Circuit Court of Appeals for the First Circuit of the decree therein, and of the opinion of said Court, and the dissenting opinion of Brown, J., and a brief in support of this petition.

Wherefore your Petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the First Circuit commanding said Court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals in the said case therein entitled *The Salem Trust Company, Plaintiff, Appellant* v. *Manufacturers' Finance Company et al., Defendants, Appellees, No. 1515*, to the end that the said case may be reviewed and determined by this Court as provided by law, and that your Petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate.

And your Petitioner will ever pray.

THE SALEM TRUST COMPANY

By

ALEXANDER WHITESIDE
HOWARD STOCKTON, JR.
RAYMOND P. BALDWIN

Counsel

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, ss.

Alexander Whiteside, being duly sworn, says that he is one of the counsel for the Salem Trust Company, the Petitioner, that he prepared the foregoing petition, and that the allegations thereof are true, as he verily believes.

Subscribed and sworn to before me, this day of July 1922.

Notary Public

Supreme Court of the United States

OCTOBER TERM, 1921

THE SALEM TRUST COMPANY,
Petitioner

v.

MANUFACTURERS' FINANCE COMPANY ET AL.,
Respondents

BRIEF OF PETITIONER ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

FACTS

The Petitioner, a trust company organized under the laws of Massachusetts, on May 16, 1919, lent a large sum of money to the Nelson Blower & Furnace Company, a Massachusetts corporation, receiving as security, an assignment by the Nelson Blower & Furnace Company, of accounts receivable owed to it by the Murray & Tregurtha Corporation, also a Massachusetts corporation. The three parties concerned in this assignment were all citizens of Massachusetts, and the money owing was to be paid in Massachusetts (Record, pp. 17, 18).

Subsequently, namely, on or about July 15, 1919, the Nelson Blower & Furnace Company borrowed a large sum of money from the Respondent, Manufacturers' Finance Company, a Delaware corporation, but one having a usual place of business

in Boston, Massachusetts, being permitted, after compliance with the Massachusetts laws, to do business in Massachusetts, and as security, assigned to the Respondent the same accounts previously assigned to the Petitioner. The Respondent took the assignment without inquiring of the Murray & Tregurtha Corporation as to whether notice had been given to it of any previous assignment (Record, pp. 17–20, 39).

On or about September 20, 1919, about one week before the Nelson Blower & Furnace Company was placed in the hands of a receiver, the Manufacturers' Finance Company notified the Murray & Tregurtha Corporation of the assignment made to it, of the accounts receivable (Record, p. 18).

The rival assignees agreed with each other that the Nelson Blower & Furnace Company, acting by its receiver, should finish the work being done for the Murray & Tregurtha Corporation, and that the net proceeds, amounting to $7,963.36 (less than the amount of the claim of either assignee), should be deposited in the Respondent, International Trust Co. (a Massachusetts corporation having a usual place of business in Boston, Massachusetts), in a special deposit standing in the name of the Manufacturers' Finance Company, as trustee, pending the determination by a court of competent jurisdiction of the question as to which assignee was entitled to such proceeds (Record, pp. 19, 20).

The clause of the agreement between the Petitioner and the Manufacturers' Finance Company, relative to the disposition of the proceeds, reads as follows:—

> "6. If the parties hereto shall not be able to agree upon the ownership of the proceeds of any of such accounts, then the question of such ownership shall be determined by a proper proceeding or proceedings in some Court of competent jurisdiction, which proceeding or proceedings may be brought by either party hereto at any time" (Record, p. 22).

In accordance with the agreement, the Petitioner brought a Bill in Equity in the Superior Court for the County of Suffolk, Commonwealth of Massachusetts, against the Manufacturers'

Finance Company and the International Trust Co., and the Manufacturers' Finance Company filed a Motion that the suit should be removed to the District Court of the United States for the District of Massachusetts, and against the objection of your Petitioner, the suit was so removed. It was heard by Anderson, J., and dismissed by a Final Decree entered May 6, 1921 (Record, pp. 1, 23).

Thereafter, upon appeal by your Petitioner, the United States Circuit Court of Appeals for the First Circuit, by a decision handed down on April 11, 1922, affirmed the decree of the District Court with costs to the Manufacturers' Finance Company, appellee. A dissenting opinion was rendered by Brown, J. (Record, pp. 34–49).

It clearly appears in the proceedings, and has not been denied, that the parties to the first assignment were both citizens of Massachusetts, that the debtor owing the accounts assigned was a citizen of Massachusetts, that the assignment was made in Massachusetts, and that the money owed was payable in Massachusetts. It further appears that the second assignment was made by a citizen of Massachusetts, of an account owed by a citizen of Massachusetts, and payable in Massachusetts, but that the assignee was a citizen of Delaware (a corporation actually having a place of business in Massachusetts, having complied with the laws of Massachusetts, permitting it to do business therein).

Questions

I. Was the proceeding erroneously removed from the Massachusetts Court to the United States Court?

II. Which assignee has the prior claim to the proceeds of the assigned accounts?

ARGUMENT

I

THE PROCEEDING WAS ERRONEOUSLY REMOVED FROM THE MASSACHUSETTS COURT TO THE UNITED STATES COURT

The Petitioner contends that the International Trust Co. is a necessary and indispensable party to the case, and as it is a citizen of Massachusetts, the case was properly brought in the State Court and should not have been removed to the Federal Court.

Wilson v. *Oswego Township*, 151 U. S. 56.

Mass. & Southern Construction Co. v. *Cane Creek Township*, 155 U. S. 283.

U. S. Compiled Statutes 1916, Vol. I, Note No. 251 on p. 650, and authorities therein cited.

The Petitioner contends that the deposit in the hands of the International Trust Co. was the trust *res*, and that in order to determine the title to this trust *res* it was necessary for the trust company to be joined as a party.

The Wilson Blower & Furnace Company, in order to have collected its claims against the Murray & Tregurtha Corporation, would have been obliged to sue in the State Courts of Massachusetts. An assignee of the claims, even though a citizen of some other State, stands in no better position than the assignor.

U. S. Compiled Statutes, Sec. 991, (1).

Manufacturers' Finance Company, being permitted to do business in Massachusetts, could be sued in the Massachusetts Courts.

G. L. of Mass., c. 181, ss. 3–8.

Therefore, the Superior Court of Massachusetts was a "court of competent jurisdiction" within the meaning of Article 6 of the Agreement of Trust above quoted.

II

THE FIRST ASSIGNEE (YOUR PETITIONER) HAS THE PRIOR CLAIM TO THE PROCEEDS OF THE ASSIGNED ACCOUNTS

The Circuit Court of Appeals in the majority opinion by Bingham, J., speaks of what it calls "the well-established rule in the Federal Courts that the party who first gives notice of his assignment is to be regarded as having the greater equity."

In the same opinion it also speaks of the law of Massachusetts "relating to the assignment of *choses-in-action*," and Brown, J., in the dissenting opinion, makes this statement: "It is conceded that under the law of Massachusetts, the fund belongs to the Salem Trust Co., the first assignee."

At the outset, therefore, it is clear that in the mind of the Court there were two rules of law,—the so-called Federal rule and the so-called Massachusetts rule. A study of the case makes it appear obvious that the Manufacturers' Finance Company thought that the law governing successive assignments of *choses-in-action* differed in the Federal and Massachusetts Courts, and that was the reason for its petition for removal of the case to the Federal Court.

An analysis of this idea existing in the minds of the Circuit Court of Appeals and of the Respondent seems appropriate and it involves three questions: *First:* What territory is the jurisdictional unit whose law applies? *Second:* What Court is to be followed in the determination of that law? *Third:* What is the rule laid down by such Court?

Since the contracts of assignment were both made in Massachusetts, and to be performed there, and since all the parties involved, with the exception of the Manufacturers' Finance Company, were Massachusetts corporations, and since the forum was a Massachusetts forum, it is evident that the territorial law of Massachusetts must govern all the questions involved, unless the fact that the Manufacturers' Finance Company was a Delaware corporation, gives it the right to demand

the application of the law of some other geographical unit. That the Respondent has no such right, is evident from the cases cited by Brown, J., in his learned dissenting opinion in the Court below (Record, p. 37), namely:

Horn Silver Mining Co. v. *New York*, 143 U. S. 305, 315.
Shaffer v. *Carter*, 252 U. S. 37, 53.

But, though the territorial law of Massachusetts applies, there still remain the questions as to what is the territorial law of Massachusetts, and what ought properly to influence the Federal Courts in their declaration of such law. This is well stated by Professor Beale in the Summary to the 1902 Edition of Beale's Cases on Conflicts of Laws, as follows:—

> *Sec. 13.* "When two courts of equal authority, and without a common superior, have the duty of declaring the same law, there is no possibility of compelling them to adopt the same view of the law. If they differ, this cannot mean that there are two laws, but merely that one court or both, is mistaken in its statement of the law.
>
> An example of such co-ordinate courts, without a common superior is the State and Federal Courts, in all cases where Federal jurisdiction depends upon diverse citizenship. *In such cases the Federal Court is declaring the law of the State*, but declines to accept as binding, a prior declaration of the law by the State Court."

The majority opinion in the Circuit Court of Appeals held that the relative merits of the equities of successive assignees of the same *chose-in-action* was a question of general jurisprudence, and that, consequently, the Federal Courts were not bound by decisions of the State Courts in determining the territorial law of Massachusetts.

The decision seems erroneous. The law involved is the body of law governing the physical territory of the Commonwealth of Massachusetts. There can be only one true body of law governing any geographical unit. The Massachusetts Courts have an established rule on the precise question here involved.

If the rule thus established is not the law of Massachusetts, it must be because of the existence of another rule of law applicable to Massachusetts, which the Federal Courts sitting in Massachusetts are bound by precedent or are at liberty to follow. If the Federal Courts declare a rule of law without the restrictions of a binding precedent, then such rule must be in accordance with reason and the true principles of law and equity pertaining to the question involved. If they are bound by precedent, it must be precedent applicable within the territorial limits of their jurisdiction, as established either by the State Courts, by the District or Circuit Courts for Massachusetts, or by the Supreme Court of the United States, either for Massachusetts, or for the United States as a whole. The decisions of the Circuit Court of Appeals for the other Circuits are not binding upon the Circuit Court of Appeals for the First Circuit; although conflicting decisions in different Circuits, where not justified by a similar conflict between the rules of the State Courts in their respective territories, may indicate that one or the other is in error, and thus justify the granting of a writ of certiorari.

The Petitioner contends that the true rule applicable to this case is the rule that notice to the debtor is not necessary to protect a prior assignee of a *chose-in-action* against a subsequent assignee who, having made no inquiry of the debtor, was not deceived by want of such notice, and who has not acquired a legal title prior to such notice.

The Petitioner further contends that the decision of the Circuit Court of Appeals for the First Circuit is erroneous, and should be reviewed, for the following reasons:—

(*a*) It is inconsistent with the principles laid down by the Circuit Court of Appeals for the Sixth Circuit.

(*b*) It is contrary to the rule laid down by the Supreme Judicial Court of Massachusetts.

(*c*) It is inconsistent with the principles laid down by the Supreme Court of the United States.

(*d*) It is contrary to the true principles of law and equity.

(c) The question is one of great importance, affecting the rights of all persons taking assignments of choses in action.

(a)

THE INDIANA ASSIGNMENT ACTS AND PREVIOUS LEGISLATION ON THE SUBJECT.

In *Petition of the National Discount Company*, [redacted] a petition was brought by an assignee of accounts receivable against the trustee in bankruptcy of the assignor. The court said (page [redacted]):

> "Under the generally accepted rule of law and where no fraud, the rights of the debtors under the accounts are not involved, the assignments in question, made in the usual course of business, were valid as against both the bank and the creditors, notwithstanding no notice was given the latter, and in spite of the fact that the assigned claims remained in the bankrupt's possession, and the [redacted] liable to pay the claims were not notified of the assignment.
>
> "[redacted]"

The court continues (on page [redacted]):

> "By the General Law as interpreted by the courts of Tennessee, notice to the debtor of the assignment of a chose in action is necessary to perfect it as against either the debtor or subsequent assignees or creditors. The holding of the Tennessee courts that notice to the debtor is necessary to the validity of an assignment of choses in action is based upon an interpretation of the General Law

The Court in the Sixth Circuit, where the rule of the Tennessee Courts is that stated above as the Federal Court rule, holds that the Tennessee rule is opposed to the great weight of authority, and cites in support of this view the Federal cases above mentioned.

It will be contended by the Respondent, Manufacturers' Finance Company, that there is a distinction between these two cases, namely, that the case in the Sixth Circuit deals with a trustee in bankruptcy of the assignor.

It is evident, however, that the Court in the Sixth Circuit considered the necessity of notice to protect the first assignee from later assignments as well as from creditors and trustees in bankruptcy of the assignor. It refers to the Tennessee rule as holding that "notice to the debtor of the assignment of a *chose-in-action* is necessary to perfect it as against either the debtor or *subsequent assignees* or creditors." It makes no distinction between subsequent assignees and creditors in its statement that the Tennessee rule is contrary to the great weight of authority.

It is submitted that the two decisions present a clear conflict of authorities, and that this Court should take jurisdiction of the Petitioner's case by a writ of certiorari, in order to define a correct rule that may be uniformly applied.

(*b*)

THE DECISION IS CONTRARY TO THE RULE IN SUCH CASES LAID DOWN BY THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

See:

Thayer v. *Daniels*, 113 Mass. 129.
Putnam v. *Story*, 132 Mass. 205.
Herman v. *Conn. Mutual Life Ins. Co.*, 218 Mass. 181, 186.
Rabinowitz v. *People's National Bank*, 235 Mass. 102, 104.

By these cases the Massachusetts rule is settled that the first assignee of a *chose-in-action* prevails against a later assignee, unless either the first assignee is estopped or the second assignee gets legal title. It is admitted by the Respondent and was decided by both lower Courts that under the Massachusetts rule your Petitioner would prevail.

The only authorities relied upon by the majority in the Circuit Court of Appeals in our case in refusing to follow the rule thus laid down were the cases of

Methven v. *Staten Island Light, Heat and Power Co.*, 66 Fed. 113;
In re Leterman, Becher & Co., 260 Fed. 543;

and the fact that certiorari was denied in the latter case. Both are cases in the Second Circuit. The latter rests solely upon the former. The former merely states, without discussion or authority, that where questions of general jurisprudence are concerned, the State Court decisions need not be followed, and declares itself bound by *Judson* v. *Corcoran*, 17 Howard 612, and *Spain* v. *Hamilton's Administrator*, 1 Wall. 604, to follow the rule of *Dearle* v. *Hall*, 3 Russell, 1. The cases of *Judson* v. *Corcoran* and *Spain* v. *Hamilton's Administrator, supra*, will be dealt with more fully later, but it should be noted that both were cases arising in the District of Columbia where no State law was involved. As to the denial of certiorari, Brown, J., points out in his dissenting opinion that "the fact that the Supreme Court in *Coleman & Co.* v. *Tawas Co.*, 250 U. S. 668, denied certiorari in *In re Leterman, Becher & Co.*, 260 Fed. 543, adds nothing to the authority of the case in the lower Court.

See

Hamilton Brown Shoe Co. v. *Wolf Brothers*, 240 U. S. 251, 257, 258."

In any event the denial of certiorari in that case should not affect the rights of the parties here for the contracts in *In re Leterman, Becher & Co., supra*, were made after the decision in that Circuit of *Methven* v. *Staten Island Light, Heat and Power Co., supra;* whereas in our case, when the assignments

were made, the established decisional rule of the Massachusetts State Courts was as yet unassailed by any contrary decision of its Federal Courts, and the petition for certiorari in the *Leterman* case had not been denied.

We are unable to find any decision of your Honorable Court to the effect that the requirement of notice by an assignee of a *chose-in-action* to the debtor is a question of general jurisprudence. The contrary would seem to appear from the application of local law in *Green* v. *Dockendorff*, *supra*.

Since the rule of the necessity of notice laid down in the case of *In re Leterman, Becher & Co.*, *supra*, is in the nature of a recording act, it would seem that the cases of conditional sales and chattel mortgages should by analogy, apply. Yet in those cases local law has been followed.

Etheridge v. *Sperry*, 139 U. S. 266.
Thompson v. *Fairbanks*, 196 U. S. 516, 523.
Humphrey v. *Tatman*, 198 U. S. 91.
York Mfg. Co. v. *Cassell*, 201. U. S. 344.
Bryant v. *Swofford*, 214 U. S. 279.

In the last cited case of a conditional sale, both merchandise and book accounts were treated alike, and the local law of the State was applied.

In his dissenting opinion in the Circuit Court of Appeals in our case, Brown, J., says:—

> "If an assignment in writing delivered to the assignee is deemed sufficient, a court of the United States should not attempt to prescribe for the states a general rule of public policy which imposes conditions additional to or contrary to those prescribed by the laws of the state."

It appears to your Petitioner that it is the function of a legislature, rather than of a court, to require a notice by an assignee to a debtor of a *chose-in-action*, in order to protect subsequent assignees.

For the reasons stated, it is submitted that the Circuit Court of Appeals for the First Circuit should have followed the Massachusetts cases above cited.

(c)

THE DECISION IS INCONSISTENT WITH THE PRINCIPLES LAID DOWN BY THE SUPREME COURT OF THE UNITED STATES

See

Greey v. *Dockendorff*, 231 U. S. 513.

In that case the question was one of the validity of liens claimed by Dockendorff, a creditor, on accounts receivable assigned to him by the bankrupt. The case arose on a petition against the trustee in bankruptcy. It appeared that Dockendorff had lent money to the bankrupt under an agreement whereby the bankrupt was to assign to Dockendorff accounts receivable within seven days of shipment of goods. Were such assignments good as against general creditors of the bankrupt? The Court held that they were, and said at page 516 (Mr. Justice Holmes):—

> "The advances were the liens by which the bankrupt got the ownership of the goods. The contract of itself would operate as a conveyance as soon as the rights to which it applied were acquired. *Field* v. *New York*, 6 N. Y. 179. . . . It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors. *Williams* v. *Ingersoll*, 89 N. Y. 508, 522, and merely keeping silence to the latter whether known or unknown created no estoppel.
>
> *Wiser* v. *Lawler*, 189 U. S. 260 at 270.
> *Ackerman* v. *True*, 175 N. Y. 353, 363.
>
> There was no active concealment and no attempt to mislead any one interested to know the truth."

It appears that your Honorable Court, in considering the question of the validity of an assignment, applied the local law as laid down by decisions of the New York Courts. The Circuit Court of Appeals for the First Circuit in our case refused under similar circumstances to apply the local law established by the Massachusetts Courts.

In *Greey* v. *Dockendorff*, furthermore, your Honorable Court

held that notice to the debtors was not necessary to the validity of an assignment where there was no attempt to mislead any one interested to know the truth. The Circuit Court of Appeals in the First Circuit in our case required that notice be given by the first assignor, although it had made no attempt to mislead anyone, and although apparently the later assignee was not sufficiently interested to inquire as to prior assignments.

(d)

THE DECISION IS CONTRARY TO THE TRUE PRINCIPLES OF LAW AND EQUITY

The scholarly dissenting opinion of Brown, J., in our case sets forth clearly and at length the true state of the law and the sound reasons which led him to find for your Petitioner. We refer your Honorable Court to that opinion.

The majority opinion rests solely upon the assumption that an arbitrary rule of law already existed, which the Circuit Court of Appeals for the First Circuit was bound to follow. The rule is stated thus: "That the party who first gives notice of his assignment is to be regarded as having the greater equity," and in support of the decision the Court cites:—

Judson v. *Corcoran, supra.*
Spain v. *Hamilton's Administrator, supra.*
Laclede Bank v. *Schuler,* 120 U. S. 511 at 516.
Methven v. *Staten Island Light, Heat and Power Co., supra.*
In re Leterman, Becher & Co., supra.
Farmers and Merchants Bank v. *Farwell,* 58 Fed. 633, 637 to 639.

It is apparent that so far, at least, as general creditors of the assignor are concerned, notice by an assignee to the debtor is not necessary to protect an assignment.

Greey v. *Dockendorff, supra.*
Petition of the National Discount Co., supra.
Hawley Down-Draft Furnace Co., supra.

If, therefore, such notice is necessary to protect the first assignee from a later assignee of the same *chose-in-action*, it must be because of the existence of some condition subsequent invalidating an assignment already valid. If any rule thus abrogating an existing right has been established by your Honorable Court, it should be strictly applied, and it is not within the province of the Circuit Court of Appeals for the First Circuit recklessly to enlarge it.

Under the Massachusetts rule as set forth in the Massachusetts cases above cited, the title of an assignee of a *chose-in-action* who has given no notice to the debtor can be defeated by a subsequent assignee who obtains legal title, or can show such conduct or neglect on the part of the first assignee, and action in reliance thereon, as to raise an estoppel. It is submitted that this rule offers adequate protection to subsequent assignees, and that the cases relied upon to support the so-called "Federal Rule" do not, in fact, go beyond the rule thus laid down by the Massachusetts Courts.

The doctrine on which the cases applying the so-called "Federal Rule" are supposed to stand, relates back to the English case of *Dearle* v. *Hall*, 3 Russell, 1. There the third assignee of the equity of a *cestui que trust* was the first to give notice to the trustee. The Court held that the assignee thus giving notice prevailed over the prior assignees. But this third assignee had made inquiry, and the following extract shows that the Court thought this fact material:—

> (page 18) "It was said that Hall (the successful assignee) had not exercised due diligence; for that the question, whether there was any prior encumbrance on the fund was not put directly either to Brown (the assignor) or to the executor, and it is true that the question was not put in expressed words; but was it not put in substance? The inquiries were such as drew from Unthank (the trustee) what is tantamount to an assurance that there was an absolute title in Brown."

Failure on the part of the courts in some of the Federal cases clearly to remark the material circumstance relied on by the Court in *Dearle* v. *Hall*, is, in the opinion of your Petitioner, the cause of the confusion which has arisen.

Of the cases relied upon by the majority of the Circuit Court of Appeals for the First Circuit, there are only three decided by your Honorable Court. These are:—

Judson v. *Corcoran*, *supra*.
Spain v. *Hamilton's Administrator*, *supra*.
Laclede Bank v. *Schuler*, 120 U. S. 511 at 516.

In *Judson* v. *Corcoran*, a part owner of a suspended claim against Mexico, for unlawful seizure of a cargo, assigned to Judson an interest therein, subsequently assigning the entire claim to others. To the latter assignments Corcoran eventually succeeded and prosecuted the claim to a final award by the Board of Commissioners. Judson gave no notice of his claim until the final award. It was held (page 614):

> "Here Corcoran has drawn to his equity a *legal title* to the fund, (the award of the Commissioners) which legal title Judson seeks to set aside, and asks an affirmative decree in his favor to that effect."
>
> "Now nothing is better settled than that this cannot be done. The equities being equal, the law must prevail."

The dictum relied upon to establish the so-called "Federal Rule" is as follows:—

> "There may be cases in which the purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was of whom he bought, as, for instance, where the purchaser who alone has *made inquiry* and given notice to the debtor . . . would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy."

In *Spain* v. *Hamilton's Administrator*, Hamilton assigned to Spain generally all claims which he had or might later have against any person or body corporate for commissions for personal services. Later Hamilton assigned a specific claim for commission to other assignees for value. The person from whom the commission was payable "accepted" the later assignments upon notice thereof. Spain gave no notice until after

such "acceptance," six years after the assignment to him. Your Honorable Court found for the later assignees. That they had made inquiry and that your Honorable Court considered this important is seen on page 623 where it is said:—

> "On the contrary Wetmore and Corcoran and Riggs used every precaution to protect themselves before the latter lent to Hamilton $25,000."

The case of *Laclede Bank* v. *Schuler* is not a case involving successive assignments, but a check and an assignment,—an entirely different proposition. The Court said the check was only an acknowledgment of a debt.

Your Petitioner respectfully submits that your Honorable Court has never rendered any decision establishing or laying the foundation for the establishment of the so-called "Federal Rule" as it has been stated by the Circuit Court of Appeals for the First Circuit in our case, or by the Circuit Court of Appeals for the Second Circuit, in the two cases immediately hereafter dealt with. These cases are *Methven* v. *Staten Island Light, Heat and Power Co., supra*, and *In re Leterman, Becher & Co., supra*. They are not binding upon the Circuit Court of Appeals for the First Circuit. The authorities relied on in the former were *Judson* v. *Corcoran* and *Spain* v. *Hamilton, Administrator, supra*, and the latter case relied upon the former.

Another Federal case relied upon by the Circuit Court of Appeals for the First Circuit is *Farmers and Merchants Bank* v. *Farwell, supra*, a case in the Circuit Court of Appeals for the Eighth Circuit, where there is a dictum (page 637) to the effect that a prior assignee who gives no notice may be estopped, and the Court cites *Dearle* v. *Hall, supra, Spain* v. *Hamilton, Administrator, supra*, and *Judson* v. *Corcoran, supra*, and adds (page 638):

> "and they rest upon the rule that where one of two innocent parties, holding titles of equal apparent validity, must suffer through the fault of a third, that one must bear the loss who has put it in the power of the third to commit the fraud."

That is quite different from saying that the first assignee will lose, even though the second assignee, having made no inquiry, was not deceived by any want of notice and himself gave notice long after giving value for the assignment.

It is submitted that a rule whereby the right of a prior assignee, who has given no notice to the debtor, can be defeated by a second assignee, who makes inquiry of the debtor before taking his assignment, and takes such assignment in reliance upon the debtor's assurance that he has received notification of no previous assignments, offers adequate protection for later assignees; that this is the rule approved by your Honorable Court in the cases above cited; that an extension of this protection to the extent of making the validity of assignments arbitrarily dependent upon notice, regardless of the merits of the case, is in the nature of a recording act, and tantamount to judicial legislation; and that the cases of *Methven* v. *Staten Island Light, Heat and Power Co.* and *In re Leterman, Becher & Co., supra*, which establish such rule for the Second Circuit are not precedents binding upon the Circuit Court of Appeals for the First Circuit in our case, and are not well-founded or equitable decisions.

(*c*)

THE QUESTION IS ONE OF GREAT IMPORTANCE, AFFECTING THE RIGHTS OF ALL PERSONS TAKING ASSIGNMENTS OF CHOSES-IN-ACTION

It is a matter of common knowledge that a vast amount of the credit of the financial and commercial world is extended on the security of assignments of accounts receivable and other *choses-in-action*.

Before taking an assignment an assignee may make inquiry of the debtor as to prior assignments. If no notice has been given of any, he may feel safe in lending money on the security offered. But if he lends without inquiry, he has already taken his chance, and the giving of notice by him later cannot work an estoppel against a prior assignee. If effective at all, it must

be because of some arbitrary rule of law, making notice equivalent to the recording of a mortgage. If such rule exists, and is to be enforced in the Federal Courts, then it is the right of the business world to have a clear pronouncement of that rule by your Honorable Court; for mere denial of certiorari establishes no precedent. As said by your Honorable Court in *Hamilton Brown Shoe Co.* v. *Wolf Brothers, supra* (page 258):—

> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ (certiorari) is in no case equivalent to an affirmance of the decree that is sought to be reviewed."

The denial of certiorari in *Coleman & Co.* v. *Tawas Co., supra*, establishes no precedent against the granting of the writ in this case.

Hamilton Brown Shoe Co. v. *Wolf Brothers, supra.*

In *Coleman & Co.* v. *Tawas Co.*, the contracts of assignment were made after the case of *Methven* v. *Staten Island Light, Heat and Power Co., supra*, had been decided in the Circuit in which they were made and were to be carried out; whereas when the contracts in our case were made, the Massachusetts decisional rule stood unassailed. Furthermore, since the denial of the writ in *Coleman & Co.* v. *Tawas Co., supra*, the case of *Petition of National Discount Co., supra*, has arisen in the Sixth Circuit, causing a conflict in the Federal Courts. In *In re Leterman, Becher & Co.*, there was no dissenting opinion. In our case the dissenting opinion of Brown, J., covers fifteen pages, going through the cases exhaustively, and pointing out the necessity of the decision sought by your Petitioner.

CONCLUSION

Under the Massachusetts decisional rule it is clear that your Petitioner, being the first assignee in point of time, is entitled to the fund deposited with the Respondent, International Trust Co. We contend that the question of the effect of notice to the debtor is a question for the local law and that the Circuit

Court of Appeals for the First Circuit should have applied the Massachusetts rule. We further contend that even should it be found that the question is one of general jurisprudence and that the Federal Courts are not bound by the decisions of the State Court, nevertheless, there exists no Federal authority binding upon the Circuit Court of Appeals for the First Circuit to justify the establishment of the arbitrary rule applied by it in our case. On the contrary, the decisions of your Honorable Court favor the view contended for by your Petitioner.

We respectfully submit that the question involved is one of great importance, that the law on the subject is conflicting, and that the only method of finally determining the matter is for this Court to take jurisdiction by writ of certiorari.

Respectfully submitted

THE SALEM TRUST COMPANY

By

ALEXANDER WHITESIDE
HOWARD STOCKTON, JR.
RAYMOND P. BALDWIN
Counsel

Supreme Court of the United States

OCTOBER TERM, 1923

[No. 74]

SALEM TRUST COMPANY, PETITIONER

v.

MANUFACTURERS' FINANCE COMPANY ET AL., RESPONDENTS

BRIEF FOR MANUFACTURERS' FINANCE COMPANY

This is a bill in equity brought by the petitioner, a Massachusetts corporation, against the Manufacturers' Finance Company, a Delaware corporation, and the International Trust Company, a Massachusetts corporation, to establish the petitioner's right as against the Manufacturers' Finance Company to a certain fund on deposit with the International Trust Company.

The suit was originally brought in the Superior Court of Massachusetts but was removed to the United States District Court on the petition of Manufacturers' Finance Company on the ground of diverse citizenship, the International Trust Company being a mere nominal party to the proceeding. After the denial of a motion to remand (Record, p. 14) the case was tried in the District Court upon agreed facts (pp. 16–19).

The agreed facts show that on May 16, 1919 the Nelson Blower & Furnace Company (hereinafter called the Nelson Company), a Massachusetts corporation, assigned to the petitioner, for valid consideration, the indebtedness due and to become due the Nelson Company to the amount of $45,000 from the Murray & Tregurtha Corporation, also incorporated in Massachusetts, under a contract whereby the Nelson Company was to construct certain marine engines for the Murray & Tregurtha Corporation. On July 15, 1919 the Nelson Company assigned to the respondent Manufacturers' Finance Company (hereinafter called the Finance Company), for valid consideration, the same indebtedness to the amount of $40,000, and on September 20 the Nelson Company made another assignment of the same indebtedness to the Finance Company to the further amount of $10,000. On or about September 20 the Finance Company, having no knowledge of the prior assignment to the petitioner, duly notified the Murray & Tregurtha Corporation of the assignments to it. At that time the Murray & Tregurtha Corporation had not been notified of the assignment to the petitioner.

On September 26, 1919 the Nelson Company was placed in the hands of a receiver by a decree of the United States District Court in equity.

On October 6, 1919 the petitioner and the Nelson Company entered into an agreement (Exhibit No. 1, pp. 18–19) whereby the Nelson Company was to collect the assigned accounts and deposit the proceeds in the International Trust Company in the name of the Finance Company as trustee, the agreement providing that "if the parties hereto shall not be able to agree upon the ownership of the proceeds of any such account, then the question of such ownership shall be determined by a proper proceeding or proceedings in some Court of competent jurisdiction, which proceeding or proceedings may be brought by either party hereto at any time."

When the suit was brought the amount on deposit in the International Trust Company was $7,963.36, which is less than the amounts advanced to the Nelson Company by the respective parties on the security of the assignments and still due them.

In the District Court it was held that the Finance Company was entitled to priority, although its assignment was later in time than that to the petitioner, because it was the first to give notice to the debtor (pp. 21–22), and a decree was accordingly entered dismissing the bill.

The decree was affirmed in the Circuit Court of Appeals, Brown, District Judge, dissenting (pp. 26–38).

The judges were unanimous in approving the refusal of the District Court to remand the case to the State Court.

I

The Motion to Remand was Properly Denied

The fact that the International Trust Company, which, like the plaintiff, is a Massachusetts corporation, was made a party defendant, did not prevent the removal of the case. It was in no sense a necessary party, as it had no concern whatever with the outcome of the controversy between the plaintiff and the Manufacturers' Finance Company. A final decree in favor of the plaintiff would naturally run against the Manufacturers' Finance Company only, requiring that company to draw a check on the account in favor of the plaintiff. The International Trust Company is a mere debtor of the Manufacturers' Finance Company, and the fact that the deposit stands in the name of the latter as trustee does not change the relation.

See *in re Nichols*, 166 Fed. 603 (D. C. N. Y.).
Minard v. *Watts*, 186 Fed. 245 (C. C. Kansas).
Fletcher v. *Sharp*, 108 Ind. 276.
Paul v. *Draper*, 158 Mo. 197.
Perry on Trusts, 6th Ed. § 122.

It is settled that the citizenship of a merely nominal party is immaterial upon the question of removability on the ground of diverse citizenship.

Walden v. *Skinner*, 101 U. S. 577.
Barney v. *Latham*, 103 U. S. 205.
Bacon v. *Rives*, 106 U. S. 99.
Ex parte Nebraska, 209 U. S. 436.

In *Bacon* v. *Rives*, it was claimed that the case could not be removed to the federal court because of the citizenship of one of the defendants who was an executor of a certain estate. The court said (at p. 104):

> "[The executors] were made defendants, not because of any connection they had with the main controversy, but to the end that [the testator's] interest in that estate might be reached and held, subject to such final decree as the complainants might obtain against him. Though made, formally, defendants, they occupied, substantially, the position of mere garnishees. Their citizenship was, consequently, immaterial. The necessary parties, on the respective sides of the controversy which is the foundation of the litigation, being citizens of different states, the relation of the executors to the suit was properly regarded as merely incidental."

Indispensable parties whose citizenship must be taken into consideration are those "who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Niles-Bement-Pond Company* v. *Iron Moulders' Union*, 254 U. S. 77, 80.

In the lower federal courts there are various cases resembling the present, in all of which it has been held that the non-resident defendant was entitled to removal.

New York Construction Company v. *Simon*, 53 Fed. 1 (C. C. Ohio).

Shattuck v. *North British Mercantile Insurance Company*, 58 Fed. 609 (C. C. A. 8th Circ.).
American National Bank v. *National Benefit & Casualty Company*, 70 Fed. 420 (C. C. Col.).
First National Bank v. *Bridgeport Trust Company*, 117 Fed. 969 (C. C. Conn.).
Harvey v. *Harvey*, 290 Fed. 653 (C. C. A. 7th Circ.).

II

The Bill was Properly Dismissed

The English rule as declared in *Dearle* v. *Hall*, 3 Russ. 1, and later cases, that as between two successive *bona fide* assignees of the same chose in action the second will prevail if he was the first to give notice to the debtor, is the rule of the federal courts; and as the question is one of general jurisprudence, the fact that the courts of Massachusetts do not follow the English rule is immaterial.

A. *The English Rule is the Rule of the Federal Courts*

That the party who first gives notice of his assignment is entitled to priority is, to use the words of the Circuit Court of Appeals in the present case, "the well established rule in the federal courts."

Judson v. *Corcoran*, 17 How. 612.
Spain v. *Hamilton's Administrator*, 1 Wall. 604.
Laclede Bank v. *Schuler*, 120 U. S. 511, 516.

In *Judson* v. *Corcoran* the court said (at p. 615):

> "There may be cases in which a purchaser, by sustaining the character of a *bona fide* assignee, will be in a better situation than the person was of whom he bought; as, for instance, where the purchaser, who alone had made inquiry and given notice to the debtor, or to a trustee holding the fund, . . . would be preferred over the prior purchaser, who neglected to give notice of his assignment, and warn others not to buy. The cases of *Dearle* v. *Hall* and *Loveridge* v.

> *Cooper* . . . established the doctrine to the foregoing effect in England."

In the Spain case *Dearle* v. *Hall* was again expressly followed, the court saying (1 Wall. at p. 624):

> "In order to perfect his title against the debtor, it is indispensable that the assignee should immediately give notice of the assignment to the debtor, for otherwise a priority of right may be obtained by a subsequent assignee, or the debt may be discharged by a payment to the assignee before such notice."

The foregoing decisions have always been regarded as settling the question for the federal courts.

In *Farmers & Merchants Bank* v. *Farwell*, 58 Fed. 633, 637, 638 (C. C. A. 8th Circ.), the court said:

> "If, while he held possession of the policies and was prosecuting the actions upon them in his own name Frishman had assigned his claim against the companies to the bank or to a third person for value, and without notice of the prior assignment, and the subsequent assignee had first given notice to the Insurance Companies of his assignment, Farwell & Co. would have been estopped to claim the proceeds of the policies as against such an assignee. To this effect are *Dearle* v. *Hall*, *Spain* v. *Hamilton's Administrator* and *Judson* v. *Corcoran*. And they rest upon the rule that where one of two innocent parties, holding title of equal apparent validity must suffer through the fault of a third that one must bear the loss who has put it in the power of the third to commit the fraud."

In *Methven* v. *Staten Island Light Heat & Power Co.*, 66 Fed. 113 (C. C. A. 2d Circ.), the question was squarely presented whether a second assignee who gave notice should prevail over a prior assignee who did not. The court followed *Dearle* v. *Hall*, although the law of the state (New York) was conceded to be different.

> "As we understand the judgments of the Supreme Court of the United States in *Judson* v. *Corcoran*, 17 How. 612, and

Spain v. *Hamilton's Administrator*, 1 Wall. 604, they approve the doctrine of *Dearle* v. *Hall* and *Loveridge* v. *Cooper*. . . . Whatever view we might otherwise be disposed to take of the question, we are concluded by the authority of these judgments. As the question is one of general jurisprudence, this court is not controlled by the decisions of the highest court of the state" (p. 115).

In *The Elmbank*, 72 Fed. 610, 616 (D. C. Cal.), is this statement:

"It may be conceded that the rule is as stated by counsel; that is, that, where there are two or more assignments from one person to several upon the same fund or debt, the assignee who first gives notice of his claim to the debtor or holder of the fund, the equities between the several assignees being otherwise equal, acquires the prior right to a satisfaction of his demand, although, as a matter of fact, his assignment is subsequent in point of time to that of other assignees."

In *Third National Bank* v. *Atlantic City*, 126 Fed. 413, 415 (C. C. N. J.), it was said:

"There has been much conflict of authority in the state courts with reference to the priority existing between successive assignees of the same fund—whether the one whose assignment is prior in time, or the one who first gives notice to the debtor, is entitled to be first paid—but so far as this court is concerned it feels itself concluded by the judgments rendered in the Supreme Court of the United States" in *Judson* v. *Corcoran* and *Spain* v. *Hamilton's Administrator*. (The decision of this case was reversed, on other grounds. See 130 Fed. 751.)

In *In re Hawley Down-Draft Furnace Co.*, 233 Fed. 451, 453 (D. C. Penn.; s. c. on appeal, 238 Fed. 122), the court said:

"Between two assignments of the same book accounts under otherwise like circumstances, the assignee who first gives notice to the debtor is first in right."

Finally, in *In re Leterman, Becher & Co., Inc.*, 260 Fed. 543, 547 (C. C. A. 2d Circ.), this language was used:

> "In *Methven* v. *Staten Island* . . . this court had before it the question whether an assignee who first gives notice to the debtor has the prior right though the assignment to him is later in date than that to the other assignee. The court held that as between two assignees the one who first gives notice has the better right. In so deciding this court declared that the question is one of general jurisprudence and that the decisions of the highest court of the state are not controlling. We adhere to that ruling in this case. . . . In this respect the rule in New York differs from the rule in the federal courts, and from that which prevails in England and in the courts in many of the states."

The case in the Sixth Circuit, *Petition of the National Discount Company*, 272 Fed. 570, relied upon by the petitioner, is not in point, as there the question was not between a prior and a subsequent assignee, but between a prior assignee and a subsequent trustee in bankruptcy. Similarly *Greey* v. *Dockendorff*, 231 U. S. 513, is not pertinent, as there again the question was merely whether an assignment was good as against a trustee in bankruptcy. Indeed Mr. Justice Holmes stressed this point, saying:

> "Notice to the debtors was not necessary to the validity of the assignment *as against creditors.*" (Italics ours.)

That the English rule is the rule of the federal courts has been universally assumed and stated by other courts and by text writers. See, for example:

Fortunato v. *Patten*, 147 N. Y. 277, 283.
Graham Paper Co. v. *Pembroke*, 124 Cal. 117, 120, 121.
Lambert v. *Morgan*, 110 Md. 1, 26, 27.
Enochs-Havis Lumber Co. v. *Newcomb*, 79 Miss. 462, 467.
Jenkinson v. *New York Finance Co.*, 79 N. J. Eq. 247, 260.

Jack v. *National Bank of Wichita*, 17 Okla. 430, 435.
Phillips's Estate, 205 Pa. 515, 521.
Coffman v. *Liggett*, 107 Va. 418, 422.
Pomeroy, Eq. Juris., 4th Ed. §695, Note J.
66 L. R. A. 761.
5 Corp. Jur. 953.
19 Yale Law Journal, 258, 263.
60 Univ. of Penna. Law Rev. 668, 669.

Judge Brown's suggestion that the rule applies only when the second assignee has made inquiry and been in fact misled by the failure of the first assignee to give notice, in other words, to cases where an estoppel can be made out, does not find support in the authorities.

In *Dearle* v. *Hall* itself the rule appears to have been rested upon the theory that the giving of notice is analogous to a taking of possession (see the language of Lord Chancellor Lindhurst, 3 Russ. at p. 58), and it is not suggested that there must have been inquiry by the second assignee.

In *Foster* v. *Cockerell*, 3 Cl. & Fin. 456, a House of Lords decision approving and following *Dearle* v. *Hall*, a second assignee who had made no inquiry was preferred, and no mention of inquiry was made in the opinion.

In *Meux* v. *Bell*, 1 Hare, 73, this question was elaborately discussed and it was concluded that inquiry was not a necessary element to recovery.

See Story, Equity Jurisprudence, §1384.

In the federal courts, and in the state courts which follow *Dearle* v. *Hall*, the rule is stated and applied without being limited to cases where the second assignee made inquiry or was in fact misled. See the cases and text writers above cited, and also

Lambert v. *Morgan*, 110 Md. 1.
Scott's Cases on Trusts, p. 623.

In the courts below, the petitioner was unable to refer to any case, decided by any court which purports to follow *Dearle* v. *Hall*, in which the first assignee has been preferred on the ground of the absence of inquiry by the second assignee.

B. *The Question is one of General Jurisprudence.*

The decision of the Circuit Court of Appeals in this case, applying the federal rule in spite of the fact that the Massachusetts courts do not recognize this rule, follows the decisions of the Circuit Court of Appeals of the Second Circuit in which the rule applied in the New York state courts was similarly disregarded.

Methven v. *Staten Island Light, Heat & Power Co.*, 66 Fed. 113.

In re Leterman, Becher & Co., Inc., 260 Fed. 543.

There are no decisions to the contrary, and no suggestion has been found in any of the federal cases that the question is one upon which the federal courts are bound to follow state decisions.

In both *Judson* v. *Corcoran*, *supra*, and *Spain* v. *Hamilton's Administrator*, *supra*, the question was obviously dealt with by this court as one of general jurisprudence; and the mere fact that for many years the "federal rule" on the subject has been constantly referred to and recognized by courts and text-writers indicates the opinion of the profession that it is such a question.

It is of course true, as Judge Brown says in his dissenting opinion (p. 29), that "the jurisdiction which a state possesses over property within its borders extends alike to tangible and intangible property" and that "a vested right of action is property in the same sense in which tangible things are property," but it by no means follows that a state court, in drawing one conclusion or another

with respect to the equitable principles applicable to the rights of successive assignees of a chose in action, there being no statute on the subject, is establishing a local "rule of property" in the sense in which that phrase is used in the classification of decisions which are binding on the federal courts.

The application of the 34th section of the Judiciary Act of 1789 is limited "to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character."

Swift v. *Tyson*, 16 Pet. 1, 18.

The rights of owners of choses in action have been constantly dealt with by the federal courts as matters of "general jurisprudence."

The question whether a transferee of a negotiable instrument is entitled to rank as a holder of value is such a question.

Swift v. *Tyson*, 16 Pet. 1.
Oates v. *National Bank*, 100 U. S. 239.
Railroad Company v. *National Bank*, 102 U.S. 14.

So the right of a purchaser of municipal bonds to rely upon recitals therein is a question of general jurisprudence.

Presidio County v. *Noel-Young Bond Company*, 212 U. S. 58.

State decisions are not binding upon the question of the validity of the assignment of an insurance policy.

Russell v. *Grigsby*, 168 Fed. 577 (C. C. A. 6th Circ.) (decision reversed on another ground, 222 U. S. 149).
New York Life Insurance Company v. *Dunlevy*, 214 Fed. 1, 5 (C. C. A. 9th Circ.).

Nor upon the question whether the right to dissolve is waived in a bank passes to the bank in the absence of agreement.

In re Farmers Security, 289 Fed. 108 (C. C. A. 2d Cir.), and see

In re Governor Bleasing Company, 266 Fed. 610 (D. C. Ala., affirmed by C. C. A. 277 Fed. 1015).

Nor upon the question whether an instrument purporting to effect an absolute transfer of title may be shown to have been intended as security only.

Russell v. *Southard*, 12 How. 139.

Nor as to the rights of a holder of an insurance policy issued before the payment of the first premium.

MacKelvie v. *Mutual Benefit Life Insurance Company*, 287 Fed. 660 (C. C. A. 2d Cir.).

It is submitted that Judge Brown also draws an unwarrantable conclusion from the statement of this court in earlier cases that "The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement" (p. 29).

It does not follow that in determining what those laws are the decisions of the state courts must be treated as conclusive in the federal courts.

See *Aetna Life Insurance Company* v. *Moore*, 231 U. S. 543, 559.

Myrick v. *Michigan Central Railroad*, 107 U. S. 102.

Harper v. *Hochstim*, 278 Fed. 102 (C. C. A. 2d Cir.).

Johnson v. *Charles D. Norton Company*, 159 Fed. 361 (C. C. A. 6th Cir.).